No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, *et al.*,
Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

1. Whether a city's residential rent control ordinance may be deemed a "contract, combination . . . or conspiracy" violative of the Sherman Antitrust Act?

2. Whether ordinary standards of antitrust analysis, including *per se* rules developed in the context of predatory business practices, should be applied to evaluate municipal regulatory action undertaken in the public interest?

3. Whether municipal regulation can qualify for the state action exemption from the Sherman Act only on the basis of an explicit authorization in a single statute, or whether the necessary state authorization can be provided by a combination of state constitutional provisions and legislative actions?

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INTEREST OF *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States, and an organization of city and regional planners and officials concerned with planning and orderly urban development. *Amici* have a vital in-

terest in legal issues that affect the powers and responsibilities of state and local governments.

As this case is presented to the Court, the issue concerns whether a city may regulate rents without violating the Sherman Act. Far broader issues, however, are implicated in the decision. Not only will this Court's decision affect the role of local governments in regulating housing, but the decision inevitably will affect the ability of local governments to regulate other businesses in the public interest. In particular, a decision by this Court adverse to appellees would raise serious questions about all rate regulation by home rule local governments.

Many local governments regulate the maximum rates that may be charged for public services such as taxicabs, trash collection, parking, airport operations, and ambulances. The current spate of antitrust litigation, moreover, extends to areas far beyond the rate litigation involved in the present case. Franchising, business and occupational licensing, municipal contracting and planning and zoning regulations all have offered targets for antitrust litigation. The cost is literally incalculable as cities are forced to spend scarce dollars responding to this wave of lawsuits.

Amici believe that traditional antitrust analysis is misapplied in the context of local public rate regulation. Rate regulation that is neutral among competitors and that is enacted in the public interest by a city with no competitive stake in the regulated market should not be lightly abrogated.

Significantly, there is no allegation or proof in this case of any conspiracy between the City of Berkeley and any private competitors. For nine decades, no court imagined any conflict could exist between such local public rate regulation and § 1 of the Sherman Act in the absence of a conspiracy. *Amici* submit that, against this background and in light of the sketchy record on this appeal, the judgment below upholding the ordinance should be affirmed.

INTRODUCTORY STATEMENT

This appeal presents the question whether a residential rent control ordinance adopted by the City of Berkeley is preempted by the Sherman Antitrust Act. While *amici* believe that the challenged ordinance falls within the state action exemption, they urge the Court to determine that the Sherman Act should not be applied at all to this kind of regulatory activity.

Amici recognize that local governments are not immune from the operation of the antitrust laws. Antitrust restraints may apply to a local government in cases in which it participates in a regulated market or conspires with one or more market competitors. However, ordinary antitrust analysis is anomalous when applied to a general regulation, enacted by a city in the public interest. The regulation of rates is a commonplace activity of local governments. Municipalities routinely establish maximum rates for a wide range of public services, including trash collection, ambulance service and taxicab service.

The California Supreme Court recognized that, to the extent that municipal regulations are subject to antitrust scrutiny, the ordinary *per se* rules developed in the context of predatory commercial practices make no sense. Applying such rules to regulatory actions of cities would handicap local government efforts to deal with important urban problems.

Berkeley's rent control ordinance was not enacted to stifle competition in the rental housing market, but to correct an imbalance in that market. The city acted to assure that rental housing would continue to be available to its residents at reasonable rates. While economists may differ concerning the wisdom and efficacy of rent control, its choice as a remedy for Berkeley's housing problem represented a legislative decision by the voters of the municipality which should not be subject to second-guessing by the courts.

SUMMARY OF ARGUMENT

1. Berkeley's residential rent control ordinance is not preempted by the Sherman Act. The Sherman Act prohibits only those restraints of trade that are implemented by a "contract, combination . . . or conspiracy," and the ordinance neither mandates nor permits concerted private activity which could fit that definition. Consequently, the Act can be applied to the ordinance only through an inappropriate legal fiction that would treat government compulsion as the equivalent of a conspiracy.

2. State and local government regulation in the public interest serves goals similar to those of the Sherman Act, and should not be evaluated on the same basis as the commercially motivated actions of private businesses. State and local governments are responsible to their electorates and operate under public scrutiny. They are, moreover, subject to the constraints imposed by the Civil Rights Act upon overreaching and exploitation "under color of state law." Their legislative and regulatory actions should not be assessed under *per se* rules developed to control predatory commercial activity.

3. The Local Government Antitrust Act of 1984 did not establish nor endorse any substantive standard of antitrust liability for local governments, but left the development of those standards to the courts. The Act sought only to discourage private litigation against municipalities by insulating them from liability for damages and imposing conditions on private antitrust plaintiffs.

4. Even if Berkeley's rent control ordinance were deemed to be inconsistent with the Sherman Act, it would be protected from preemption by the state action exemption. The ordinance implements responsibilities placed upon the city by state law; it is closely similar in substance to an earlier charter provision which was expressly ratified by the state legislature; and California's

courts have concluded that the ordinance has state authorization. Because the only action challenged as anticompetitive in this case is that of the city, active state supervision is not required for the application of the state action exemption.

ARGUMENT

I. THE ORDINANCE IS VALID UNDER THE SUPREMACY CLAUSE BECAUSE IT DOES NOT CONFLICT WITH THE SHERMAN ACT.

The threshold issue in this appeal, which comes to this Court without any factual record, is whether the ordinance on its face is in conflict with the Sherman Act. If the ordinance does not conflict with the Sherman Act, then the judgment below should be affirmed.

A. Berkeley's Rent Control Ordinance Is Not Inconsistent With the Sherman Act Because It Does Not Mandate Nor Permit Concerted Activity.

Section one of the Sherman Act, 15 U.S.C. § 1, prohibits only those restraints of trade that are implemented by a "contract, combination . . . or conspiracy." The Act reflects a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, ——, 104 S.Ct. 1464, 1469 (1984). This Court has never found a conflict between § 1 of the Sherman Act and a state law or local ordinance that displaced competition with public regulation but did not mandate or permit private concerted action.[1] *See Com-*

[1] Appellants have not claimed in this Court that the ordinance conflicts with § 2 of the Sherman Act, although they did raise this claim in the court below. Any such claim must fail. To establish a violation of § 2, a relevant market must first be established. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). Here appellants have neither alleged nor proven any relevant market. Indeed, the city is not even a participant in the regulated housing market.

munity Communications Co. v. City of Boulder, 455 U.S. 40, 47 n.9 (1982) (citing district court's finding with respect to conspiracy issue).

Thus, in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), this Court unanimously held that a California statute governing the distribution of alcoholic beverages was not preempted by the Sherman Act under the Supremacy Clause. The statute at issue in *Norman Williams* prohibited any "unauthorized wholesaler from obtaining the distiller's products from outside the distiller's established distribution chain." 458 U.S. at 661. Significantly, the "designation" of authorized wholesalers required by the California statute depended upon an *actual agreement* between a distiller and his designated wholesalers in California.

Notwithstanding this element of private concerted action in *Norman Williams*, this Court held that the statute did not necessarily conflict with the Sherman Act, and was therefore valid under the Supremacy Clause. The Court reasoned as follows:

> [A] state statute, when considered in the abstract, may be condemned under the antitrust laws *only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases*, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. 485 U.S. at 661 (emphasis added).

Amici submit that *Norman Williams* is controlling in this case. The Berkeley ordinance does not require conduct that constitutes a violation of the antitrust laws, nor does it place "irresistible pressure" on private parties to violate the antitrust laws. Therefore, the ordinance is not preempted by the Sherman Act.

This Court's decision in *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), is not to the contrary. That case involved a California statute that permitted wine producers to fix the resale price of their wine. The statute, in effect, circumvented the Consumer Goods Pricing Act of 1975, 89 Stat. 801 (1975), which revoked the authority Congress had previously granted the states to authorize resale price maintenance. *See Midcal*, 445 U.S. at 102-03.

This Court found that the California statute was preempted by the Sherman Act:

> California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. [citations omitted] *The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers.* 445 U.S. at 103 (emphasis added).

The statute at issue in *Midcal* authorized a private party—the wine producer—to compel a second private party—the wholesaler—to enter into an agreement fixing resale prices. It is precisely this element of private concerted action, which was present in *Midcal*, that is wholly lacking in this appeal.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), on which appellants rely, is also inapposite. In that case, this Court held that a state statute enacted pursuant to the Miller-Tydings Act, 50 Stat. 693 (1937) (repealed by the Consumer Goods Pricing Act, 89 Stat. 801 (1975)), could not authorize an injunction prohibiting price-cutting by a retailer who had refused to enter into a resale price maintenance agreement with his distributor. Justice Douglas, in his opinion for the majority, noted that the Miller-Tydings Act expressly prohibited *horizontal* price-fixing agreements, and that the "spirit" of this express provision was violated by any prohibition on price-cutting by retailers who had *not* signed resale price maintenance agreements. 341 U.S. at 389. "In *Schwegmann*, the State attempted to authorize and immunize *private* conduct violative of antitrust laws." *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96,

110 (1978) (emphasis added). As the ordinance here neither authorizes nor seeks to immunize any private conduct violative of the Sherman Act, *Schwegmann* is not on point.

In this appeal, there is no allegation or proof of any private concerted action. Instead, this case involves government regulation of the rents charged by individual landlords. The City of Berkeley, through the ordinance, limits the rent charged by each landlord to the rent that landlord charged on May 31, 1980, plus any increase permitted pursuant to the ordinance. Far from reflecting concerted action by the landlords, the ordinance is actively opposed by them. The ordinance neither mandates nor authorizes concerted action by anyone.

Thus, the ordinance could conflict with § 1 of the Sherman Act only by the creation of a legal fiction that government compulsion of individuals is to be deemed to be a "contract, combination . . . or conspiracy" for purposes of that act. There is some confusion among appellants and the *amici* supporting them on the exact legal fiction that they wish to urge. Appellants assert that the requisite concerted action should be assumed to be among the landlords. Appellants' Brief at 22-23. *Amicus* California Housing Council, Inc., on the other hand, submits that the *tenants* in Berkeley should be the fictional conspirators. *Amicus* Brief at 4. This Court should reject both theories as fanciful.[2]

[2] As noted above, the existence of a conspiracy among the landlords of Berkeley is flatly contradicted by their strenuous opposition to the ordinance. To the extent that it can be argued that there was an agreement among the tenants to obtain enactment of the ordinance through the initiative process, it should be protected from antitrust challenge under the *Noerr-Pennington* doctrine. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-140 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-670 (1965). Under the *Noerr-Pennington* doctrine, "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr* at 136. The participation by a tenant as a voter in an initiative process should be treated as though it were "an attempt to persuade the legislature" for purposes of analysis under the *Noerr-Pennington* doctrine.

There is no good reason to create any legal fiction in this appeal. Indeed, this Court has recently rejected the use of a legal fiction to find the concerted action necessary for a violation of § 1 of the Sherman Act. In *Copperweld Corp. v. Independence Tube Corp.*, —— U.S. ——, 104 S.Ct. 2731, 2745 (1984), this Court held that a corporation and its wholly-owned subsiidary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act." As this Court stated, the distinction between concerted and unilateral action in § 1 of the Sherman Act will "necessarily disappoint those who find that distinction arbitrary." 104 S.Ct. at 2744. Appellants here are among those disappointed, because the ordinance neither mandates nor permits any concerted action among landlords or anyone else. Therefore, the ordinance does not conflict with § 1 of the Sherman Act, and should be upheld under *Norman Williams*.

B. Public Interest Regulation by Local Governments Should Not Be Subjected to the Same Analysis for Antitrust Purposes as Anticompetitive Commercial Activity

In many ways, the Sherman Act and the regulatory acts of state and local governments serve common purposes. The Sherman Act was designed by Congress to be a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), *quoting from* R. Bork, *The Antitrust Paradox* 66 (1978). Governments, too, perform important consumer protection functions. *See* Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059, 1095-1099 (1980). Governments have responsibility in countless areas for providing services to the public which otherwise would not be provided on an

equitable basis, or would not be provided at all, because of inefficiencies or diseconomies in the private sector.

Fundamental differences distinguish the actions of local governments taken in furtherance of public policy objectives from the commercially motivated actions of private parties. As this Court noted in *Town of Hallie v. City of Eau Claire*, —— U.S. ——, 105 S.Ct. 1713 (1985):

> Where a private party is engaging in the anti-competitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. 105 S.Ct. at 1720-21 (emphasis in original).[3]

State and local governments, moreover, are unlike private parties in that they "are checked to some degree through the electoral process." *Town of Hallie*, 105 S.Ct. at 1720 n.9. States and their local governments have the power and the responsibility under the intergovernmental system to implement public policy in various fields. A formidable body of constitutional, statutory and case law attempts to sort out the varying responsibilities of the federal, state and local governments in providing essential services and in regulating private parties to advance the public interest.

[3] In *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1571-72 (5th Cir.) (en banc), *petition for cert. filed*, 53 U.S.L.W. 3509 (U.S. Dec. 14, 1984) (No. 84-951), Judge Higginbotham, in a concurring opinion, stated that:

> [W]here . . . the city acts as a regulator or governor of the sales and deliveries of goods and services to its constituents, it is engaged in a role dissimilar from that of private business.
>
> In our economic system, private business enterprises are presumed to respond predominately, if not exclusively, to the profit motive. By contrast the concept of "profit" *per se* is alien to the purposes of a unit of government. Consequently, the clash of interests necessitating an antitrust law—the private desire to reap extra-normal profits versus the public interest in free competition—will not appear in its traditional form when the accused antitrust conspirator is a governmental entity.

As noted in *Town of Hallie*, 105 S.Ct. at 1720 n.9, the activities of governmental entities are subject to public scrutiny under state open meeting laws, "sunshine" statutes, and other mandatory disclosure requirements such as freedom of information or financial disclosure acts.

In addition, unlike private parties, local governments, when acting "under color of state law," are subject to full review of their activities under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Just as the antitrust laws prevent overreaching and exploitation by private sector actors, § 1983 imposes duties on public officials and governmental entities. Neither government, exercising its police power, nor private business, wielding economic power, is allowed to violate fundamental principles of fairness and equity under the American system of law. Civil rights statutes play a similar role in accomplishing this objective for government as do the antitrust laws in the private sector.

Appellants argue that the ordinance is preempted under the Supremacy Clause because it is "contrary to federal procompetition policies." Appellants' Brief at 22. They imply that, although there is no *direct* conflict between the ordinance and the Sherman Act and no evidence of concerted action, the ordinance nonetheless should be preempted because its supposed effects are contrary to the underlying policy of the Sherman Act. However, there has been no evidentiary hearing in this case, and consequently the record in this Court contains no facts on the economic effects, good or ill, of the ordinance. Indeed, appellants' complaint neither mentions the Sherman Act nor contains any allegation as to the effects of the ordinance on competition.

This Court has ruled that where a law is attacked on its face on constitutional grounds, deference must be

given to the legislative determination that the law is needed. "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).[4]

The same deference should be paid to state and local laws when a facial challenge is based on a federal statute. For example, when confronted with a set of economic circumstances not previously examined, this Court has in the past insisted on a full factual record before finding a conflict with the policies of the Sherman Act. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 10 (1979) (an eight week trial had been held in district court; this Court noted "[we] have never examined a practice like this one before").

The well-settled law concerning the application of the *per se* rules to price-fixing among private parties articulated in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), should not be applied to legislative actions of local governments taken to protect the common welfare. Legislative actions implementing public policy should not be assessed under the *per se* rules as the public policy advanced by the action of the local government cannot properly be judged under those rules.

This Court has recognized some of the doctrinal difficulties in applying existing antitrust rules to the activities of local governments. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 at 417 n.48 (1978); *Boulder*, 455 U.S. at 56 n.20. The California Supreme Court properly declined to apply mechanically to Berkeley's ordinance the formulae developed for antitrust enforcement in the private sector. In the absence of a

[4] "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." *Sproles v. Binford*, 286 U.S. 374, 388-389 (1932), cited in *Ferguson*, 372 U.S. at 730 n.7.

factual record, this Court should not find Sherman Act preemption, but should affirm the decision below.

C. The Local Government Antitrust Act of 1984 Does Not Sanction The Preemption of Regulatory or Legislative Actions By Local Governments.

Appellants suggest that Congress, in enacting the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34 to 36, sanctioned the application of traditional antitrust standards, including the *per se* rules, to regulatory or legislative actions of local governments. *See* Appellants' Brief at 15-16.[5]

The Local Government Antitrust Act of 1984, which precludes the recovery of monetary damages from local governments under the Sherman Act, was enacted on the next to the last day of the 98th Congress. It was designed as an interim measure, to stem the flood of antitrust lawsuits challenging the regulatory and legislative actions of local governments in the wake of this Court's decision in *Boulder*. While Congress chose the "remedies" approach, primarily to prevent financial disaster for local governments, the Act's legislative history conclusively refutes any intention on the part of Congress to endorse the application of the antitrust laws to regulatory or legislative actions by local governments.

The House Judiciary Committee recognized that § 1 of the Sherman Act was not originally intended to apply to states and localities, noting: "A review of the legislative history of the Sherman Act reveals no evidence of an express Congressional intent to apply the antitrust laws to either state or local governments." H.R. Rep. No. 965, 98th Cong., 2d Sess. 4 (1984) (hereinafter "H.R. Rep.

[5] Several of the *amici* supporting appellants make similar arguments. *See, e.g.*, Brief of National Apartment Association *et al.* at 13-15; Brief of California Housing Council, Inc. at 15-16; Brief of Coalition for Competition in Apartment Rentals at 19-23.

No. 98-965"). Statements during floor debate by the legislation's sponsors echoed this view. Thus, Representative Peter Rodino, Jr. of New Jersey, Chairman of the House Judiciary Committee and the floor manager of the bill, although he had reservations about exempting *non-governmental* actions of local governments from antitrust scrutiny, stated: "At least where classic governmental activity to enhance or protect the public health, safety, or welfare is concerned, most everyone agrees that the antitrust laws have no place in, and can only interfere with, legitimate governing." 130 Cong. Rec. H8474 (daily ed. Aug. 6, 1984). And Representative Hamilton Fish, Jr. of New York, the ranking minority member of the Committee, stated: "The Federal antitrust laws were never intended to apply to legitimate governmental decisionmaking." *Id.* at H8475.

The Committee chose to focus on eliminating the immediate financial danger facing local governments. A major obstacle to Congressional enactment of substantive antitrust standards for local governments was the courts' failure to establish a consistent doctrinal basis for the state action exemption.[6] The Committee faulted this Court for failing to provide "even indirect guidance" on the question of how "the national policy favoring competition" should be reconciled with "*the presumptively valid functions of local government.*" H.R. Rep. No. 98-915 at 7 (emphasis added). It concluded that, "[a]t a

[6] "The Supreme Court has been criticized—and perhaps rightfully so—for not applying a consistent theory in the recent 'state action' cases. The five decisions before *Midcal* contain thirteen separate opinions. The two critical opinions involving municipalities (*Lafayette* and *Boulder*) contains (sic) eight separate opinions by various Justices. The Court is open to criticism . . . for its failure to provide an analytical framework by which state action cases can be predicted with reasonable certainty. The only certainty in the law (as a result of the *Boulder* decision) may be that a home-rule amendment to a state constitution is not sufficient in itself to immunize a municipality's action in a wide variety of contexts." H.R. Rep. No. 98-965 at 7 (footnotes omitted).

minimum," the record before the Judiciary Committee provided sufficient justification for the enactment of legislation to "remove the punitive aspect from antitrust suits." *Id.* at 12.

Citing the problems in attempting to establish "a substantive standard that protects some but not all of a local government's activities," the Committee approved legislation that would provide municipalities with "immediate and certain relief from the potential for catastrophic loss which the trebling provision of the antitrust laws has created." *Id.* at 18. This potential had materialized in January of 1984 when a jury awarded a developer $28.5 million in damages (after trebling) against a county and a village for failing to extend sewer lines to the developer's property. *Unity Ventures v. County of Lake*, No. 81 C-2745 (N.D. Ill. 1984). The alternative approaches considered by the Committee were found to be likely to compound the problems facing local governments because of the risk of "varying and uncertain application by the courts." H.R. Rep. No. 98-965 at 18. Thus, Congress enacted the Local Government Antitrust Act of 1984 in response to concerns raised by representatives of local government that, because of their governmental responsibilities, they could not wait "for the case law to synthesize into a coherent theory." *Id.* at 18. It was Congress' expectation, however, that this Court would clarify these standards. *Id.* at 3.

Three approaches were considered by the Committee. One approach would have established a "legislative immunity for municipalities co-extensive with that of States provided that the local conduct is 'valid under State law' or that 'authority is vested' by the States for such conduct." *Id.* at 13. Citing the confused condition of the state action exemption as it applies to states and the more than fifty reported cases on the state action exemption since the 1980 *Midcal* ruling, the Committee stated that "the antitrust jurisprudence as it applies to States and State

agencies remains case-specific, highly uncertain and, in some areas, undefined" and, as a result, would likely lead to increased litigation if extended to local governments. *Id.* at 13.

A second approach was an exemption for nonproprietary governmental activities from antitrust scrutiny. With respect to this approach, the Committee cited the "interpretive difficulties that some courts have had in applying similar tests based upon the distinction between governmental and proprietary activities" in other areas of law. *Id.* at 15.

A third approach—the so-called municipal rule of reason—was not approved by the Committee for essentially the same reasons. *Id.* at 16. The Committee believed that this proposal would create new uncertainties:

> The difficulty with such a test is that it is unclear as to what kind of evidentiary showing would be required by courts in sustaining a local government's action as being "reasonably undertaken." Whether such a showing could be made on the initial pleadings without extensive discovery is also uncertain. Moreover, to the extent that the subject matter jurisdiction should, as a general proposition, be established by a court as expeditiously as possible, this may not always be possible in complex cases. *Id.* at 17.

Congress acted to reduce the volume of antitrust litigation against local governments, by restricting "private remedies to injunctive relief" under § 16 of the Clayton Act, 15 U.S.C. § 26. H.R. Rep. No. 98-965 at 11, 18; S. Rep. No. 593, 98th Cong., 2d Sess. 2 (1984). That section, while it allows for injunctive relief in cases of violations of § 1 of the Sherman Act, does not provide a right to the type of preemption ruling requested by appellants.

Congress, in enacting the Local Government Antitrust Act of 1984, intended to make it difficult for antitrust

plaintiffs to bring actions against local governments. Specifically, it expected that plaintiffs would be subject to the strict requirements of § 16, including the provision requiring the posting of a bond before a preliminary injunction could be issued by the court:

> While this remedy approach does not create a new substantive test, it does impose a substantial burden on plaintiffs at the outset of litigation. Plaintiffs who fail to secure a preliminary injunction may have to weigh carefully the costs of proceeding with the suit for a final disposition on the merits. Thus, this proposal should work to deter frivolous suits and to readjust the litigation advantages and disadvantages more equitably for local government defendants. H.R. Rep. No. 98-965 at 19.

This Court should deny the appellants' request for a preemption ruling on the ground that it is inconsistent with Congressional intent under the Local Government Antitrust Act of 1984 and is, moreover, procedurally flawed.

II. EVEN IF THE ORDINANCE WERE FOUND INCONSISTENT WITH THE SHERMAN ACT, IT IS NONETHELESS VALID UNDER THE STATE ACTION DOCTRINE.

Amici submit that even if the Court finds that the ordinance is inconsistent with § 1 of the Sherman Act, the ordinance is exempt from antitrust challenge under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). *See also Town of Hallie v. City of Eau Claire*, —— U.S. ——, 105 S.Ct. 1713 (1985); *Southern Motor Carriers Rate Conference v. United States*, —— U.S. ——, 105 S.Ct. 1721 (1985).

States and their local governments are part of a complex intergovernmental system which is based on state constitutional and statutory law, administrative provisions, state court decisions and local ordinances and charters. The state action doctrine attempts to establish the standards under which this array of intergovernmental relations must be evaluated for Sherman Act purposes.

This Court has noted that the cases establishing the state action doctrine "have not been entirely clear." *Town of Hallie*, 105 S.Ct. at 1720. Among other things, there was confusion regarding (1) the use of an "exemption" or "preemption" analysis, *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60 (1982), (Rehnquist, J., dissenting); (2) the degree of "clear articulation and affirmative expression" required of the state, *cf. Town of Hallie*, and (3) whether active state supervision of the actions of local governments (as distinct from the actions of private parties) was required. *Cf. Town of Hallie.*

The doctrine of *Parker*, as applied to the actions of local governments under *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978), *Boulder*, and *Town of Hallie*, confirms that the local government exemption is predicated on the actions of the *state* in setting forth *its* policies regarding the anticompetitive effect of local governmental actions. As this Court recognized in *Town of Hallie*, problems arise from this model because it involves the federal courts in the interpretation of state delegations of authority to their local governments. "Besides burdening the courts, [this review] would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny." 105 S.Ct. at 1719 n.7 (citation omitted).

Town of Hallie and *Southern Motor Carriers Rate Conference* go a long way toward clarifying the requirements of clear articulation and active supervision. The decision in this case could further clarify the state action doctrine.

The City of Berkeley was operating validly under state law, both in its charter provision and under generally applicable state statutes. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261 (1984), *prob. juris. noted*, —— U.S. ——, 105 S.Ct. 2653 (1985). In fact,

an earlier version of this same ordinance, as a charter amendment, has been ratified by a concurrent resolution of both houses of the California Legislature. Cal. Stats. 1972 (Reg. Sess.) res. ch. 96, p. 3372. *See also Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 550 P.2d 1001, 1007 n.2 (1976).

A comparison of the 1972 charter amendment and the ordinance at issue in this appeal shows that they are closely similar. Both the charter amendment and the ordinance provide for the establishment of a board to regulate housing rents. Both establish as base rents the rents charged on a date certain (August 15, 1971 in the case of the charter amendment, and May 31, 1980 in the case of the ordinance). Both allow increases from the base rent under certain circumstances and with the approval of the board. Thus, in broad outline the charter amendment and the ordinance are identical.

While the *Birkenfeld* court had found several deficiencies in the original ordinance and struck it down, in *Fisher* the California Supreme Court found that:

> [T]he ordinance before us now is solicitous of due process. The initiative drafters apparently studied *Birkenfeld*, and took it to heart: every major procedural failing that we noted in the former ordinance has been addressed, and additional procedural protections not previously mentioned have been included. 693 P.2d at 297.

Consequently, this ordinance and its predecessor have twice been before the electorate of the City of Berkeley, twice before the California Supreme Court and, in the earlier version, *affirmatively ratified* by the California legislature.

The current ordinance, unlike the charter amendment, has never been submitted to the California legislature for approval, because this is not required under California law. *See Fisher*, 693 P.2d at 308.

The 1972 ratification of an earlier version of the ordinance clearly evidences that California has a state policy approving the regulation of housing rents by the City of Berkeley. If nothing else, this state scrutiny of the ordinance's predecessor should be "instructive" of the state's intent to authorize its enactment. *Town of Hallie*, 105 S.Ct. at 1719 n.8, citing *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). Appellants can point to nothing in the years between 1972 and the present to indicate a change in this plainly articulated state policy. To the contrary, the California legislature has had the opportunity to invalidate the ordinance, but has declined to do so. In addition, of course, the City of Berkeley is charged by the state with significant responsibilities over housing. It must, for example, include a "housing element" in its general plan. Cal. Govt. Code § 65203(c). It must also use its powers to "make adequate provision for the housing needs of all economic segments of the community." Cal. Govt. Code § 65580(d). Such provisions bring the ordinance within the state action exemption to the Sherman Act.

The lessons of *Town of Hallie*, that courts must take a realistic view of "how legislatures work and of how statutes are written," and that requirements of explicit authorizations by legislatures would have "detrimental side effects upon municipalities' local autonomy and authority to govern themselves," should not be lost here. 105 S.Ct. at 1719. It is important to recognize the variety of constitutional and statutory provisions representing each state's decision on the proper allocation of authority and power between itself and its local governments. Equally important, state supreme court decisions interpreting this intrastate allocation of authority and the validity of delegation should be given considerable deference, as state tribunals have a special, indeed unique, capacity and experience in interpreting the state's constitution and laws. Given the legislative, electoral and state court oversight and approval of Berkeley's ordi-

nance, the Court should find the "clear articulation" and "affirmative expression" required by the Court's decisions from *City of Lafayette* to *Town of Hallie*.

It is clear that "active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party." *Town of Hallie* 105 S.Ct. at 1721. However, the *Hallie* Court also noted that "where state or municipal regulation of a private party is involved, . . . active state supervision must be shown, even where a clearly articulated state policy exists." 105 S.Ct. at 1720 n.10. This dictum in *Town of Hallie*, which did not involve local regulation of any private party, cited *Southern Motor Carriers*, which was decided on the same day. *Southern Motor Carriers*, like *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980),[7] involved state authorization or sponsorship of an essentially private agreement. In this respect, both *Southern Motor Carriers* and *Midcal* differ from this case, which does not involve any agreement among private parties.

Amici submit that the state supervision test is applicable only where a state or local government is authorizing or sponsoring a private agreement that would otherwise violate the antitrust laws. Thus, the state supervision test has no application to the present appeal. In contrast to *Southern Motor Carriers* and *Midcal*, there is no independent private actor here—the individual landlords in Berkeley act at the compulsion of the city government.

Furthermore in *Town of Hallie*, this Court stated that the state supervision test "serves essentially an evidentiary function; it is one way of insuring that the actor is engaging in the challenged conduct pursuant to state

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[7] The inapplicability of *Midcal's* holding to this appeal is discussed at length in this brief at pp. 6-7.

policy." 105 S.Ct. at 1720. In the present appeal, of course, the only true actor is the City of Berkeley. As argued above, Berkeley is acting pursuant to a clearly articulated state policy. Thus, the evidentiary function of the state supervision test is satisfied.

For these reasons, the state supervision test has no application to this appeal, and the ordinance should be held to be within the state action exemption under *Town of Hallie.*

CONCLUSION

For the reasons stated above, *amici* request that the judgment below be affirmed.

Respectfully submitted,

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September 12, 1985